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Public Prosecutor v Makenteren a/l Mathivanan

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HIGH COURT (ALOR SETAR) — CRIMINAL TRIAL NOS 45A-38–07 OF 2016, 45A–39–07 OF 2016 AND 45A-40–07 OF 2016
CHAN JIT LI JC
20 MARCH 2019

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Criminal Procedure — Dangerous drugs — Trafficking — Whether prosecution failed to prove accused had custody and control of drugs — Whether evidence showed high probability that others frequented place where drugs were found — Whether trial court therefore could not invoke presumptions of possession and knowledge against accused under s 37(d) of the Dangerous Drugs Act 1952 — Whether there were too many gaps in prosecution's case — Whether accused had to be acquitted and discharged

D

The accused faced a charge of trafficking in 176.2g of methamphetamine and two charges of possession of 1.28g of cannabis and 95.4g of phenazepam and nitrazepam all committed at the same place, date and time. All the drugs were found in a room of an estate house which the police raided on receiving information that drug trafficking activities were taking place there. The raid took place after a police officer ('PW4') had kept watch on the house for some time to verify whether the information received was correct. Apart from the drugs, the raiding party also seized from the same room two t-shirts (on which the accused's DNA was subsequently found), two pairs of jeans and three cellphones. The party also found a quit rent bill and an Astro bill which were in the name of the accused's father ('MS'). On the premise that the accused was the sole occupant of the house and that the drugs were found in his bedroom — and therefore, that he had custody and control of the drugs — the prosecution sought to rely upon the presumptions under s 37(d) and (da) of the Dangerous Drugs Act 1952 ('the DDA') to establish, respectively, the elements of possession/knowledge and trafficking against the accused. The testimony of MS at the trial, however, revealed that the house belonged to the company that owned the estate and it had been a family home for MS, his wife and seven children before they moved to a new house. MS said that as many of the family's belongings were still in the old house and the shift to the new place was ongoing, the house was locked most of the time unless one of his children named Koogilavanathan ('Koogilan'), to whom he had given the house keys, went to the house to deal with any matter. MS also said that one set of keys to the house was kept by the estate management office and that the accused stayed on his own and not with the rest of the family in the new house.

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Held, acquitting and discharging the accused:

(1) There was no evidence to show that the accused had custody or control over the dangerous drugs. As such, there was no ground for the court to invoke against the accused the dual presumptions of possession and knowledge under s 37(d) of the DDA or the presumption of trafficking under s 37(da) (see paras 30–31).

(2) The prosecution's evidence showed that: the house belonged to the company which owned the estate; that MS and his family had used the house (MS's name on the bills recovered at the house was consistent with this); the family had moved to another house of their own and the shifting of things from the old house to the new was ongoing; as MS's family belongings were still in the old house, the accused would sometimes go to the house to check on the belongings. These findings went against the prosecution's case that the accused had custody and control of the drugs premised on the ground that: (a) the house was solely occupied by the accused; and (b) that the drugs were found in the accused's bedroom (see paras 24–25).

(3) There were gaps in the prosecution's case: (a) why were only the T-shirts taken from the room sent for DNA analysis and not the two pairs of trousers as well? Could the trousers have belonged to Koogilan to whom MS had given the keys to the house? And, if the trousers did not have the accused's DNA, then the room where the drugs were found could not be said to be the accused's bedroom; (b) although the t-shirts had the accused's DNA, the photographs appeared to show that the accused was wearing them after the raid took place and that could be the reason why his DNA was found on the t-shirts; (c) the investigating officer did not ascertain to whom the mobile phones seized from the house belonged. Were there others living in the house to whom the drugs could have belonged? A motorcycle parked outside the house was also seized but it was not determined who its owner was; and (d) why was PW4, who had observed the house before the raid took place, not called to testify? His evidence would have been relevant and material to show whether drug trafficking activities actually took place at the house or whether other persons had visited the place (see paras 26–29).

[Bahasa Malaysia summary

Tertuduh menghadapi tuduhan mengedar 176.2g methamphetamine dan dua tuduhan memiliki 1.28g ganja dan 95.4g phenazepam dan nitrazepam semua dilakukan di tempat, tarikh dan masa yang sama. Semua dadah tersebut ditemui di dalam bilik rumah estet yang diserbu oleh polis selepas menerima maklumat bahawa aktiviti pengedaran dadah berlaku di sana. Serbuan berlaku selepas seorang pegawai polis ('PW4') telah mengawasi rumah untuk beberapa waktu untuk mengesahkan sama ada maklumat yang diterima adalah betul. Selain daripada dadah, serbuan tersebut juga merampas dari bilik yang sama, dua baju kemeja T (di mana DNA tertuduh kemudiannya dijumpai), dua

pasang jeans dan tiga telefon bimbit. Serbuan juga menemui bil cukai pintu dan bil Astro yang berada di atas nama bapa tertuduh ('MS'). Dengan premis bahawa tertuduh adalah penghuni tunggal rumah dan bahawa dadah tersebut ditemui di bilik tidurnya — dan dengan itu, dia mempunyai hak penjagaan dan kawalan dadah — pihak pendakwaan berusaha untuk bergantung kepada anggapan di bawah s 37(d) dan (da) Akta Dadah Berbahaya 1952 ('ADB') untuk membuktikan, masing-masing, unsur-unsur pemilikan/pengetahuan dan pemerdagangan terhadap tertuduh. Testimoni MS semasa perbicaraan, bagaimanapun, mendedahkan bahawa rumah tersebut milik syarikat yang memiliki estet tersebut dan ia menjadi rumah keluarga untuk MS, isterinya dan tujuh anak sebelum mereka berpindah ke rumah baru. MS menyatakan bahawa banyak barang milik keluarga masih di rumah lama dan peralihan ke tempat baru sedang berjalan, rumah tersebut berkunci kebanyakan masa kecuali seorang anaknya bernama Koogilavanathan ('Koogilan'), yang telah diberikan kunci rumah, pergi ke rumah untuk menangani apa-apa perkara. MS juga menyatakan bahawa satu set kunci rumah disimpan oleh pejabat pengurusan estet dan bahawa tertuduh tinggal sendiri dan bukan dengan seluruh keluarga di rumah baru.

Diputuskan, melepaskan dan membebaskan tertuduh:

(1) Tiada keterangan untuk menunjukkan bahawa tertuduh mempunyai penjagaan atau kawalan terhadap dadah berbahaya tersebut. Oleh itu, tiada alasan bagi mahkamah untuk menggunakan terhadap tertuduh kedua-dua anggapan pemilikan dan pengetahuan di bawah s 37(d) ADB atau anggapan pengedaran di bawah s 37(da) (lihat perenggan 30–31).

(2) Keterangan pihak pendakwaan menunjukkan bahawa: rumah tersebut milik syarikat yang memiliki estet tersebut; bahawa MS dan keluarganya telah menggunakan rumah itu (nama MS pada bil yang dijumpai di rumah tersebut konsisten dengan ini); keluarga tersebut telah berpindah ke rumah lain mereka sendiri dan peralihan barang dari rumah lama kepada yang baru sedang berjalan; oleh kerana barang milik MS masih di rumah lama, tertuduh kadang-kadang pergi ke rumah untuk memeriksa barang-barang. Penemuan ini menentang kes pihak pendakwaan bahawa tertuduh mempunyai jagaan dan kawalan terhadap dadah atas alasan bahawa: (a) rumah tersebut diduduki oleh tertuduh sahaja; dan (b) bahawa dadah tersebut ditemui di dalam bilik tertuduh (lihat perenggan 24–25).

(3) Terdapat jurang dalam kes pendakwaan: (a) mengapa hanya kemeja T yang diambil dari bilik yang dihantar untuk analisis DNA dan bukan juga dua pasang seluar? Mungkinkah seluar tersebut dimiliki oleh Koogilan yang mana MS memberikan kunci rumah? Dan, jika seluar tersebut tidak mempunyai DNA tertuduh, maka bilik di mana dadah tersebut didapati tidak boleh dikatakan sebagai bilik tertuduh;

(b) walaupun kemeja T mempunyai DNA tertuduh, gambar-gambar menunjukkan bahawa tertuduh memakainya selepas serbuan tersebut berlaku dan ianya boleh menjadi alasan mengapa DNAnya ditemui di kemeja T; (c) pegawai penyiasat tidak memastikan milik siapa telefon bimbit yang dirampas dari rumah tersebut. Adakah terdapat orang lain yang tinggal di rumah yang mungkin memiliki dadah? Sebuah motosikal yang diletakkan di luar rumah juga dirampas tetapi tidak ditentukan siapa pemiliknya; dan (d) mengapa PW4, yang telah memerhatikan rumah sebelum kejadian tersebut, tidak dipanggil untuk memberi keterangan? Keterangannya adalah relevan dan penting untuk menunjukkan sama ada aktiviti pengedaran dadah sebenarnya berlaku di rumah atau sama ada orang lain telah melawat tempat tersebut (lihat perenggan 26–29).]

Notes

For cases on trafficking, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2178–2187.

Cases referred to

Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (folld)

Legislation referred to

Criminal Procedure Code ss 173(f), 180
Dangerous Drugs Act 1952 s 37(d), (da)

Sharifah Syazwani bt Syed Hussin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecutor.
Vijayandran a/l T Thanigasalam (T Vijay & Co) for the accused.

Chan Jit Li JC:

[1] The charges against the accused were registered in three different cases. However, the cases were jointly tried. The charges are as follows:

45A-38–07 of 2015

Bahawa kamu pada 2.12.2015, lebih kurang jam 5.50 petang, di rumah beralamat No 12 AVB, Jalan Semeling, Bedong, di dalam Daerah Kuala Muda, di dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 176.2 gram. Oleh itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

45A-39–07 of 2015

Bahawa kamu pada 2.12.2015, lebih kurang jam 5.50 petang, di rumah beralamat No 12 AVB, Jalan Semeling, Bedong, di dalam Daerah Kuala Muda, di dalam Negeri Kedah Darul Aman, telah didapati memiliki dadah berbahaya iaitu Cannabis seberat 1.28 gram. Oleh itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen yang sama.

45A-40–07 of 2015

Bahawa kamu pada 2.12.2015, lebih kurang jam 5.50 petang, di rumah beralamat No 12 AVB, Jalan Semeling, Bedong, di dalam Daerah Kuala Muda, di dalam Negeri Kedah Darul Aman, telah didapati memiliki Phenazepam dan Nitrazepam seberat 95.4 gram. Oleh itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 9(2) Akta Racun 1952 dan boleh dihukum di bawah seksyen 32(2) Akta yang sama.

[2] The prosecution's case in brief is as follows. The complainant in this case is one DSP Abdull Razak bin Osman ('PW4'). However, he was holding the rank of an inspector at the time of the alleged offence. PW4 testified as follows. On the 2 December 2015 at about 4pm PW4 received information of drug trafficking activities taking place at a house identified as No 12 AVB, Jalan Semeling, Bedong. PW4 did not go and search the house immediately. Instead PW4 instructed one Insp Sohaimi bin Saad ('Insp Sohaimi') to locate the address in question. Inspector Sohaimi was also instructed to carry out observation upon locating the said house. This was for the purpose of verifying the truth of the information. According to PW4 he received a call at about 4.30pm from Insp Sohaimi informing him that the information was correct (Insp Sohaimi was not called at the trial).

[3] On receiving Insp Sohaimi's confirmation, PW4 called ten police personnel for a briefing. They were to be his raiding team members. After the briefing they left for the said address. This was about at about 5.50pm on the same day.

[4] On arriving at their destination, PW4 instructed his men to surround the house while he personally went to the front door. He knocked on the door several times but there was no response to his knocks. PW4 then peered into the house through the window. According to PW4, he was able to see the accused in the living room looking 'cemas'. He identified himself as a policeman and instructed the accused to open the door. The accused complied and together with Insp Sohaimi and his other team members, PW4 entered the house. On entering PW4 requested from the accused the latter's identity card. He also enquired from the accused where the accused's bedroom was. The accused pointed to the first room in the house.

[5] According to PW4, the first thing he did upon entering the bedroom was to search a steel cabinet. On opening the first drawer PW4 found a red bag ('exh P10') in which there was a biscuit tin (exh P11). On opening the exh P11, he found the following:

(a) one plastic packet containing transparent crystals suspected to be methamphetamine (exh P12);

(b) one small brown zipped bag (exh P13) with (15) small transparent packets (exh 14(A–O)) containing transparent crystals suspected to be methamphetamine;

(c) 49 pieces of foil (exh P15(1–49)) suspected of containing eramin 5; and

(d) one transparent plastic containing dried leaves suspected to be cannabis (exh P16).

PW4 immediately seized the said items.

[6] Apart from the above, PW4 also seized from inside the same room the following items:

(a) two t-shirts (Blue Toms Polo and Panasonic brand);

(b) two pairs of jeans (Live J Big Jeans and Co and Ku Pi Lag Jeans Wear);

(c) one weighing scale — Camry brand (exh P29);

(d) two Nokia handphones (exh P30);

(e) one Samsung mobile phone (exh P32); and

(f) one Globe brand padlock (exh P33) and its key (exh P34).

[7] After the seizures and arrest, PW4 travelled back to his office at the Kuala Muda District Police Station together with the accused and the seized items. PW4 weighed the substances suspected to be dangerous drugs in the accused's presence. He then proceeded to mark the seized exhibits and lodged a police report identified as Bedong Report No 4515–4517/15 (exh P38). Subsequent to that PW4 handed the police report, the accused and all the seized items to the investigating officer. The investigating officer was identified as Insp Mohamad Shahril bin Md Isa (PW7). The handing over is evidenced by a handing over list (exh P39).

[8] The investigating officer informed the court that he is now an 'ASP'. As the investigating officer of this raid, he had requested from the Chemistry Department two analysis. The first request was made to the Chemistry Department of Malaysia at Alor Setar was in respect of the drugs. This was to ascertain the weight and nature of the drugs which PW4 had seized. The other

request was for a DNA analysis to ascertain ownership of the clothes seized also by PW4. This was conducted by the Chemistry Department of Malaysia at Penang. The other significant aspect of his investigations is the recording of a statement from one witness called Mathivanan Shinnappayan. This statement is mainly in relation to the occupation of the house No 12 AVB, Jalan Semeling, Bedong. But I shall revert to this in greater detail later in my grounds of judgment.

[9] Puan Faesmaziana bt Napiah (PW2), told the court that she was the chemist who conducted an analysis of the substances suspected to be drugs. Her findings are contained in the chemist report (exh P8) which she prepared. After conducting the relevant tests, she was able to ascertain that the substances consisted of 176.2g methamphetamine, while the tablets had 95.4g phenazepam and nitrazepam. The packet of 'leraian bahan tumbuhan' were cannabis and weighed 1.28g.

[10] The chemist who conducted the DNA analysis was one Ms Jacqueliine Bernice a/p John Bosco ('PW8'). PW8 testified that the accused's DNA was recovered from the clothes she was asked to examine.

[11] The duty of the court at the close of the prosecution's case is to enquire whether the prosecution has established a prima facie case against the accused. After the amendments to ss 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a subordinate and the High Court under the amended sections is to call for the defence when it is satisfied that a prima facie case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution's evidence when deciding to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. If the court upon a maximum evaluation of the evidence placed before at the close of the prosecution case, comes to the conclusion that a prima facie case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a prima facie case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him (see *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457).

[12] The learned deputy public prosecutor, Pn Sharifah Shazwani bt Syed Hussein ('Pn Sharifah'), submits that the prosecution has discharged its burden. This is chiefly because there is no challenge by the defence of the nature and weight of the dangerous drugs which PW4 had recovered at the scene on the day in question. Accordingly, the prosecution seeks to rely on the

presumptions under s 37(d) and (da) of the DDA to establish the elements of possession, knowledge and trafficking.

[13] I shall deal first with the presumption under s 37(d). The provision reads as follows:

> 37 Presumptions
>
> All proceedings under this Act or any regulation made thereunder —
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> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

[14] It is clear that the operative words here is *custody or control* and thus the question which requires determination here is whether the prosecution has shown that the accused person had either custody or control of the dangerous drugs that were seized on the day of the incident. If the prosecution can establish either custody or control then 'possession' is presumed (unless contrary is proved).

[15] In *Leow Nghee Lim v Reg* [1956] 1 MLJ 28, Taylor J (as he then was) held (at p 29):

> Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. *Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.* The finding of custody means that at that stage the Magistrate had held that the opium belonged to somebody else, probably an assistant, and that the accused was taking care of it for him. He might have called his assistants to say that the tin containing opium did not belong to him but he did not do so. (Emphasis added.)

[16] It is the prosecution's case that the accused had custody and control of the drugs as the accused was the sole occupant of the house. The drugs were also recovered in his bedroom. Puan Sharifah submits that this is evident from the fact that the accused's DNA was found on the clothes which were recovered from the bed. Further, in his witness statement (exh P46), the investigating officer's had testified as follows:

16. Hasil siasatan yang telah saya jalankan di rumah tempat OKT ditangkap iaitu rumah jenis berkembar, saya telah merampas bil cukai tanah tahun 2015 dan bil Astro. Bil cukai tanah dan bil Astro adalah atas nama Mathivanan a/l Shinnappayan iaitu bapa kepada OKT. Mathivanan a/l Shinnappayan berpindah keluar bersama ahli keluarga yang lain menghuni di rumah lain.

[17] However, Mathivanan a/l Shinnappayan ('Mathivanan') ('PW6'), gave the following testimony:

Masa tinggal di sini, saya tinggal dengan anak-anak. Rumah ini estate punya. Milik estate. Ada 2 bilik. Saya pindah keluar sudah 3 tahun dari hari ini. Lebih kurang 2016. Lebih dari 3 tahun. Itu rumah keluarga, dalam keadaan baik. Ya, tinggal bersama keluarga. Magendran, Marivanathan, Manikaran, Tharamani, Tamilselvi, Kavila, Kogilavanathan. Saya ada 7 orang anak. Isteri tinggal bersama.

Perempuan semua tidur dalam satu bilik. Anak perempuan dan isteri saya. Saya bersama anak bongsu Koogilavanathan di satu lagi bilik.

2015 sudah ada rumah baru. Bila ada rumah baru, rumah lama masih ada barang. Saya kunci rumah lama dan duduk di rumah baru. Kunci rumah lama ada 1 set dan pejabat pun ada 1 set kunci. Bila saya pindah ke rumah baru, OKT masih di rumah adik saya. 'Masih tinggal'. Saya tak suka dia sebab dia kerja tetapi tidak bagi duit kepada saya jadi saya halau dia. Masa kecil tinggal bersama. Masa dia 16–17 tahun, dia kerja. Saya tanya dia duit. Dia tak bagi jadi saya halau dia dari rumah.

2015, OKT berada di luar sebab saya sudah halau dia. Saya tak tahu di mana dia tinggal. Saya tidak tahu di mana OKT tinggal pada 2015.

Pindah ke rumah baru, saya akan ke rumah lama untuk pastikan samada pintu, padlock kunci atau tidak sebab ada barang-barang dalam rumah.

Saya tidak tahu OKT ditangkap. Tak ditangkap di rumah estate saya. Kunci yang satu saya pegang dan office satu. OKT dapat masuk rumah itu kerana saya yang bagi kunci kepada Koogilavanathan untuk ambil barang. Koogilavanathan anak bongsu saya.

Saya bagi kunci kepada Koogilavanathan bukan OKT.

[18] Puan Sharifah sought to impeach PW6. She submitted that there were two material contradictions in PW6's cautioned statement and his oral evidence in court. The first contradiction related to the persons who were living in the house. In his cautioned statement PW6 had stated that the accused lived in the house alone. However, in court, PW6 testified that the accused lived in the house with the siblings. The second contradiction related to PW6's knowledge of where the accused stayed. In his cautioned statement PW6 had stated that the accused lived in the house since 1995. However, in court, PW6 testified that he did know where the accused was residing.

[19] I conclude that they were material contradiction. Hence, I asked PW6 to explain. However, PW6 said he was unsure if the statement was his. It was a

long time ago and he could not remember what he had told the police. He was also under tremendous stress then.

[20] Since PW6 was unsure of whether it was his statement or not, I conducted a trial within a trial. The recording officer for PW6's statement was the investigating officer. He testified that although PW6 was an Indian, he did not use the services of an interpreter as he was certain PW6 understood him. However, the investigating officer also testified as follows in the impeachment proceedings.

> Q. Setuju perkataan 'tinggal' di mukasurat 3 adalah bermaksud yang OKT datang tidur malam saja di rumah itu?
>
> A. Setuju.
>
> Alamat OKT diberikan dalam statement ialah 173, Lorong 5, Taman Emas, Bedong, Kedah.

[21] I find that the investigating officer's evidence explains the contradictions that PW6 made. The term 'tinggal' was not meant to be understood as permanent residence. The phrase was intended to mean that the accused would go over to the house for the night. If such was the investigating officer's explanation for the term 'tinggal', it would mean that the statement is consistent with PW6's testimony. There is, therefore, no material contradiction in PW6's oral testimony and cautioned statement. In addition to that, I also had reservations as to whether PW6 did understand the investigating officer as the latter claimed. This is because on assessing PW6's demeanor in open court, I find that PW6 had problems understanding the questions posed to him inspite of the assistance of an Indian interpreter.

[22] The investigating officer did testify on the issue: (a) of whether or not the accused was residing at the house; and (b) whether or not the accused was the sole occupier of this house. However, I find his testimony to be inconsistent and unclear. Initially ASP Mohamad Sharil bin Md Isa ('PW7') told the court as follows:

> Saya ada siasat samada orang lain yang ada access ke rumah. Hasil siasatan tiada orang yang ada access ke rumah itu.

[23] However, PW7 also testified as follows:

> Saya ada terima i.c. OKT daripada Pegawai Rampasan tetapi telah serah balik kepada OKT sebelum dia dituduh untuk dia bawa bersama i.c. ... Berdasarkan i.c. alamat OKT ialah 173, tetapi tidak ingat alamat penuh. Alamat KP 173, Lorong 5, Taman Emas, Bedong. Saya terima i.c. OKT daripada Pegawai Rampasan tetapi tidak siasat alamat itu.

Q: Jadi kamu tidak dapat sahkan dengan tepat OKT tinggal di alamat i.c. atau rumah estate sebab kamu tidak siasat? **A**

A: Ya.

Penghuni rasmi di mana rampasan bil dibuat ialah bapa OKT. Pemilik sebenar rumah itu saya ada siasat tetapi pemilik rumah dan estate tidak boleh dikesan. Ya, estate itu syarikat tetapi pemilik syarikat tidak dapat di kesan. Ada siasat tetapi tidak dapat jumpa Pengurus syarikat. Tahu ada Setiausaha Syarikat tetap tetapi saya tidak pergi cari Setiausaha Syarikat. Saya tidak tahu syarikat ada satu set kunci. Tidak tahu sebab tidak siasat. ... **B**

Q: Saya menyatakan bahawa pada 2hb Disember 2015, Mathivanan telah tidak tinggal di rumah itu lagi? **C**

A: Tahu.

Q: Mathivanan telah pindah dari rumah ini dengan isteri dan anak-anak ke satu alamat lain di Bandar. Adakah kamu tahu? **D**

A: Tahu.

Q: Oleh kerana mereka sudah pindah ada juga setengah barang milikan dia masih berada di rumah dan mereka dalam proses pemindahan barang- barang.

A: Setuju. **E**

Q: Saya cadangkan OKT pergi sekali-sekala pada malam untuk jaga barang-barang itu?

A: Setuju.

F

During re-examination, PW7 testified:

Tidak siasat atas syarikat kerana hasil siasatan rumah atas nama saksi bapa OKT berserta bil-bil (atas nama bapa). Tidak setuju ada simpan kunci satu set kerana rumah itu sudah berpuluh tahun didiami. Oleh itu syarikat tidak akan simpan kunci kerana kunci boleh tukar. Tidak setuju Koogilan juga ada kunci masa siasatan saya tidak jumpai dokumen-dokumen atau barang-barang individu lain **G**

[24] The prosecution's evidence appears to show the following. The house in question belongs to the company which owns the estate. The house was for the use of Mathivanan and his family. The appearance of Mathivanan's name on the bills recovered at the house is consistent with this. It was likely that the accused was apparently residing at another address which is 173, Lorong 5, Taman Emas, Bedong. The Mathivanan family was moving out to a house of their own at Bedong town. The shifting was an ongoing process which started since December 2015. As Mathivanan's family belongings were still in the house, the accused would sometimes return to the house to check on the family belongings. **H** **I**

[25] The findings in para 24 goes against the prosecution's case as its case that the accused had custody and control over the dangerous drugs is premised on the fact that the drugs were found: (a) in a house in which the accused was the sole occupier; and (b) in the accused's bedroom. Under such circumstances, I find that there is no evidence to substantiate the prosecution's case that the accused had custody or control over the dangerous drugs. I am further fortified in my view by the gaps in the prosecution's case.

[26] The prosecution had relied on PW8's DNA analysis to support its allegation that that bedroom was the accused's bedroom as the shirts bearing the accused's DNA was found on the bed in that room. However, PW8 had testified as follows:

> Sekiranya baju dipakai sekali sahaja masih boleh extract DNA profile from the t-shirt.

Exhibit P2(d) and (e) are photographs of the t-shirts which were purportedly seized from the bed in the bedroom in question. However, by way of photographs exh P2(a) and (b) the accused appears to be wearing the t-shirts that PW14 had seized. The photographs were taken on 3 December 2015 whereas the raid was on 2 December 2015. PW8's positive findings of the DNA on the seized t-shirts may have been on account of the accused wearing the said t-shirts after the raid.

[27] In addition to that the prosecution's evidence, both oral and documentary, consistently showed that on the day of the raid apart from the two t-shirts, PW4 had also seized two pairs of trousers. However, only the t-shirts were sent to PW8 for the DNA analysis. Why were the trousers not sent? Could the trousers have belonged to Koogilan, PW6's other son who was given the house keys? And, if indeed the trousers were not the accused's trousers, the bedroom where the drugs were found cannot be said to be the accused's bedroom.

[28] There were several mobile phones which PW4 seized from the house. According to exh P37, the search list, the said phones were found on top of the steel cabinet. The investigating officer did not ascertain to whom the mobile phones belonged. Were there others who were living in that house and to whom the drugs could belong? PW4 had also testified that a motorcycle bearing registration number PLU 5123 had been seized outside the premises. But the motorcycle was not surrendered to the investigating officer to ascertain who the owner of this motorcycle was.

[29] Why was Insp Sohaimi who made observations before the raid not called? Surely his evidence is relevant and material for he could have explained

why he (Insp Sohaimi) was of the view that there was basis to suspect that there drug trafficking activities. Inspector Sohaimi would have also been able to deny or confirm the presence of Koogilan at the house on that day.

[30] In the final analysis, I find that there is no evidence to show that the accused had custody or control over the dangerous drugs. As such, there is no ground for the court to invoke the dual presumptions of possession and knowledge under s 37(d) of the DDA.

[31] In view of this finding, it follows that there is also no ground to enable the court to invoke the presumption of trafficking in dangerous drugs under s 37(da) which the prosecution seeks to rely. This is because the presumption can only be invoked if the element of 'possession' is established.

[32] In the present case, guided by the aforesaid Federal Court case of *PP v Mohd Radzi*, I ask myself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence before me? My answer to that question is in the negative. Hence I direct that the accused be acquitted and discharged.

Accused acquitted and discharged.

Reported by Ashok Kumar